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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 807

EICHBERG & COMPANY, INC.,
Petitioner,

against

VAN ORMAN FORT WAYNE CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GEORGE B. WARBURTON,
Counsel for Petitioner,
96 Fulton Street,
New York, N. Y.

J. A. BRUGGEMAN,
PHIL M. MCNAGNY,
Utility Building,
Fort Wayne, Indiana,
Of Counsel.

TABLE OF CONTENTS.

	PAGE
Opinion Below	1
Jurisdiction of this Court	2
Question Presented	2
Statute Involved	2
Statement of the Case	2
Jurisdiction of the Court of First Instance	3
Argument	4
Conclusion	14

Table of Cases.

	PAGE
Conley v. *Gibson*, 355 U. S. ....., 78 S. Ct. 99, 2 L. ed. 2d 80 at 86	14
Employer's Liability Assurance Corporation v. *Maryland Casualty Company*, 230 F. 2d 370 (7th Cir. 1956)	8
Hanley v. *State*, 234 Ind. 326, 123 N. E. 2d 452	7
Heck v. *Schupp*, 394 Ill. 296, 68 N. E. 2d 464, 466	6
Huff v. *Selber*, 10 Fed. 2d 236	9
Huntress v. *Huntress Estate*, 7 Cir., 1957, 235 F. 2d 205, 209	11
In re Opinion of the Justices, 98 N. E. 337	7
Lebohm v. *City of Galveston*, 154 Tex. 192, 275 S. W. 2d 951	6
Warren v. *Ind. Tel. Co.*, 217 Ind. 93, 26 N. E. 2d 399	5
Wilder v. *Reno, Atty. Gen., et al.*, 39 Fed. Supp. 404	9

Statutes.

Section 12 of Bill of Rights, Indiana Constitution	5
Section 20 of Bill of Rights, Indiana Constitution	5
Section 23 of Bill of Rights, Indiana Constitution	7
28 U. S. C. A. 1254 (1)	2
28 U. S. C. A., Section 1332	3
General Business Law of New York, Section 91	4

Other Authority.

Corpus juris secundum, Volume 16, Section 96	9

Rules.

	PAGE
Federal Rules of Civil Procedure,	
Rule 7 (a)	10
Rule 14	10
Rule 12 (h)	11
Rule 52	11, 12, 13
Rule 75(d), 28 U. S. C.	8

Acts.

The Harter Act, 46 U. S. Code 190	4
The Carriage of Goods by Sea Act, 46 U. S. Code, 1303 (8)	4
49 U. S. C. A. Section 20 (11)	4
Chapter 145, Acts 1945, Indiana Legislature	2, 7, 8

Index to Appendix.

Appendix A—Opinion	1a
Appendix B—Chapter 145, Acts 1945, Indiana Legislature	8a

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit, affirming the decision and judgment of the United States District Court for the Northern District of Indiana, Fort Wayne Division, in favor of the defendant after trial.

Opinion Below.

The opinion of the United States District Court for the Northern District of Indiana, Fort Wayne Division, is unreported. The opinion of the United States Court of Appeals for the Seventh Circuit, a copy of which is printed in Appendix A, is reported at 248 F. 2d 758.

Jurisdiction of this Court.

The judgment of the District Court was dated and entered January 28, 1957. The judgment of the Court of Appeals was dated and entered October 22, 1957. The order of the United States Court of Appeals for the Seventh Circuit, denying a petition for rehearing was dated and entered December 4, 1957.

The statutory provision conferring jurisdiction on this Court to review the judgment and decision in question is 28 U. S. C. A. 1254 (1).

Question Presented.

Is the Innkeeper's Statute of Indiana unconstitutional and should the lower courts have made a finding on this issue as well as a finding on each cause of action relied upon by the plaintiff?

Statute Involved.

The case involved Chapter 145, Acts 1945, Indiana Legislature, commonly referred to as the Innkeeper's Statute. It is set forth in Appendix B.

Statement of the Case.

The plaintiff is engaged in the jewelry trade and one of its salesmen, carrying two cases of sample jewelry, registered at a hotel owned by the defendant in Fort Wayne, Indiana, on October 25, 1954. On the registration card which the salesman signed, there was this notation:

> "A safe is provided for the deposit of money, jewelry, and other valuables. This hotel will not be responsible for valuables not deposited."

There was no limitation placed on this card as to the value or size of the property the defendant would accept for safekeeping.

After signing the register, the salesman requested that the two cases be placed in the vault and signed two safety deposit envelopes which were produced by an employee of the hotel.

There was no safe in the hotel sufficiently large in which the two cases could be stored and an employee of the hotel, without the knowledge or consent of the salesman, placed the cases in a room which was open to the public and which was not even locked. When the salesman demanded the return of the cases on the morning of October 26, 1954, they could not be found.

The employees of the hotel, in placing the plaintiff's valuable merchandise in a public room, were merely carrying out the orders of their employer. At no time did the defendant hotel advise plaintiff's employee that it did not intend to place the cases in the safe, that the only safe it had was too small for his sample cases, that the servants of the defendant were not authorized to accept valuables beyond a certain amount, that there was a limit on their authority as to the size of the articles to be accepted or that these valuable cases would be placed in a room which was accessible to the public.

Jurisdiction of the Court of First Instance.

The jurisdiction of the court of first instance lies under 28 U. S. C. A. Section 1332. This suit was commenced on July 27, 1955, by the plaintiff, a New York corporation, against the defendant, an Indiana corporation, for the loss of jewelry valued in excess of $3,000.00.

Argument.

The complaint alleges two causes of action. The first was based on common law bailment[1] and the second sounded in fraud.[2]

The defendant by way of affirmative defenses pleaded the Innkeeper's Statute of Indiana.[3]

This is the first case which required an interpretation of this statute. During the course of the trial by way of oral argument and in its brief the plaintiff contended that the statute was unconstitutional. The same argument was made before the Court of Appeals. However, both courts failed to rule on this issue.

Thus we have before this Court an important question involving property rights and also questions of procedure under the Rules of Civil Procedure.

The defendant contended and the lower courts agreed, that since the plaintiff's salesman had not made known the value of the jewelry at the time he surrendered his cases, it was protected against any loss even occasioned by its own negligence by the Innkeeper's Statute. This indeed is a harsh and seemingly unjust ruling and certainly places innkeepers in a special and protected position. Common carriers, both rail and ocean, which also serve the public, do not receive this consideration but, to the contrary, are prohibited from stipulating their freedom from liability where they are negligent.[4] Warehousemen are likewise governed.[5]

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[1] Folios 1 to 3 of the record below.

[2] Folios 6 to 8 of the record below.

[3] Appendix B hereof.

[4] The Harter Act, 46 U. S. Code 190;
The Carriage of Goods by Sea Act, 46 U. S. Code, 1303 (8);
49 U. S. C. A. Section 20 (11).

[5] General Business Law of New York Section 91.

If the members of the Indiana Legislature had first examined the Bill of Rights of that state, the subject statute certainly would not have been passed in its present form. Section 12 thereof is in direct conflict with the provisions of the statute for it states:

> "SEC. 12. *Courts Open—Due Course of Law—Administration of Justice.*—All courts shall be open, and every man, for injury done to him in his person, property, or reputation, shall have remedy by due course of law, Justice shall be administered freely, and without purchase; completely, and without denial, speedily, and without delay."

There are not too many cases interpreting Section 12. It is generally read in conjunction with Section 20 which provides as follows:

> "SEC. 20. *Trial by Jury Inviolate in Civil Cases.* In all civil cases, the right of trial by jury shall remain inviolate."

The case of *Warren* v. *Ind. Tel. Co.*, 217 Ind. 93, 26 N. E. 2d 399, clearly and concisely states the attitude of the Indiana courts in protecting the rights of individuals to seek redress from wrongdoers. The highest court in Indiana stated at pages 101-102:

> "These provisions of the Constitution are a part of the fundamental law of the state, declared by the people themselves acting in their sovereign capacity. *Ellingham* v. *Dye* (1913), 178 Ind. 336, 99 N. E. 1, Ann. Cas. 1915C 200. As such they are entitled to strict construction. *Lafayette, Muncie and Bloomington R. R. Co. and Another* v. *Geiger* (1870), 34 Ind. 185. It has been said that the language of each provision of the Constitution is to be considered as though every word had been hammered into place. *State ex rel. Hovey* v. *Noble* (1888), 118 Ind. 350, 353, 21 N. E. 244.

> "Under the Constitution the right to a jury trial must remain inviolate in civil cases. This guaranty is self-executing and will be enforced independent of statutory enactment. *Schembri* v. *Shearer* (1935), 208 Ind. 97, 194 N. E. 615. But the civil cases referred to have reference only to those actions which were triable by jury at common law. *W. T. Rawleigh Co.* v. *Snider* (1935), 207 Ind. 686, 194 N. E. 356. Actions for injuries to the person caused by the negligence of another were known under the common law of England, and triable by jury. It follows, therefore, that the right to a jury trial in common-law actions for injuries to the person due to negligence is fully protected by Article 1, §20, of our Constitution."

It is submitted that the Innkeeper's Statute as interpreted and applied by the District Court and the Court of Appeals violates the provisions of the Indiana Constitution. On the trial the plaintiff successfully made out a common-law action against the bailee for hire and also proved that the defendant committed a fraud when in consideration of the plaintiff's salesman registering as a guest it promised to store his property in a non-existent safe. Notwithstanding the negligence and fraud of the defendant, the plaintiff was dismissed from court as a wrongdoer and treated as if he were the one who committed the tort.

The courts of many other states have declared statutes unconstitutional where these statutes seek to relieve various departments and persons from liability even though they have been negligent.[6]

One can only conclude that the Indiana Legislature, in passing the Innkeeper's Statute, attempted to grant Innkeepers special privileges and immunities in disregard of

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[6] *Heck* v. *Schupp*, 394 Ill. 296, 68 N. E. 2d 464, 466; *Lebohm* v. *City of Galveston*, 154 Tex. 192, 275 S. W. 2d 951.

the rights of the public in general. This obvious intention is in violation of Section 23 of the Bill of Rights of the Constitution of Indiana, which provides:

> "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

The Legislature of Indiana has attempted in the past to grant special privileges to certain classes but without success. In the case of *Hanley* v. *State*, 234 Ind. 326, 123 N. E. 2d 452, a statute granting veterans free hunting licenses was declared unconstitutional because it sought to give special privileges to one class.

The courts of all states are loathe to confer on selected individuals special rights. The reason for this is obvious for such statutes are repugnant to the Constitution (Article 14). This reasoning was clearly set forth by the Supreme Court of the State of Massachusetts in the case of *In re Opinion of the Justices*, 98 N. E. 337. That court overruled an attempt by the Massachusetts Legislature to adopt an act which in effect ruled that no court could entertain an action against a trade union for a tortious act alleged to have been committed on behalf of that union. The Supreme Court said:

> "It gives to certain favored ones, selected arbitrarily, immunity from that equal liability for civil wrongs which is a sign of equality between citizens and residents. It undertakes to clothe combinations of employers and laborers with special power denied to other employers and laborers and other members of society. In another aspect, it deprives all individuals and associations, other than those named, of the protection of safety, liberty and property which any free government must secure to its sub-

> jects. It takes from them the unhampered right to assert in the courts claims against all who tortiously assail their person and property and to recover judgment for the injuries done. It would prevent all persons from having recourse to law for vindication of rights or reparation for wrongs against the privileged few therein designated."

Under the common law an innkeeper was an insurer. It may have been proper to adopt a special statute so as to protect an innkeeper from unjust claims for property lost while in the possession of a registered guest. However, we do not think that a statute can be considered constitutional where it places an innkeeper in a more favorable position than other bailees for hire. Certainly the Legislature of Indiana could not have intended that an innkeeper's liability be limited where it has defrauded its guest, as in the case at bar.

Despite its importance, the District Court and the Court of Appeals below failed and refused to consider the constitutionality of the Innkeeper's Statute. In fact, the Court of Appeals based its refusal on the ground, erroneously, we believe, that the constitutionality question had not been properly raised in the District Court.[7]

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[7] "• • • The complaint did not challenge the constitutionality of the Indiana Act. Yet plaintiff tells us of some oral argument, undisclosed by the record, touching on constitutional aspects, which, of course, fails as a method for bringing such question before us on appeal; if indeed constitutional questions can be raised solely by counsel's oral comments in the trial court. In its repiy brief plaintiff's counsel, answering defendant's Point II, states: 'There is nothing in the record to show the position of the plaintiff below on the constitutionality of the statute. Actually we do not know how to include that in the record without printing the briefs filed below and transcribing the oral arguments.' No statement of the points on which plaintiff intended to rely on in this appeal appears of record. See *Federal Rules of Civil Procedure*, Rule 75(d), 28 U. S. C. See also: *Employer's Liability Assurance Corporation* v. *Maryland Casualty Company*, 230 F. 2d 370 (7th Cir. 1956). Exclusion of the constitutional issue leaves the Indiana Act interposed between plaintiff's claim and any recovery of damages."

The plaintiff, in questioning the constitutionality of the statute in oral argument on the trial and in its brief, properly placed this question before the trial court. It was not necessary for the plaintiff to state this issue in the complaint since it was not basing its cause of action thereon.

The procedure followed in this instance by the plaintiff is not unique but, to the contrary, has been recognized for many years. In *Wilder* v. *Reno, Atty. Gen., et al.*, 39 Fed. Supp. 404, the District Court for the Middle District of Pennsylvania held that it was proper to decide the constitutionality of a statute which the plaintiff attacked, even though this point had not been raised in the complaint.

The court stated at page 407:

> "Plaintiff's complaint does not specifically allege unconstitutionality of the state statute, but the constitutional question is inherently involved in the determination of this cause, and both parties have presented arguments on the validity of this act, under the Fourteenth Amendment to the Constitution of the United States. They are aware that the constitutionality of the state statute is in issue, and they expect this court to decide that issue. Under such circumstances, it will be considered before a determination on the merits. • • •"

The *Wilder* case reiterated the principles set forth in *Huff* v. *Selber*, 10 Fed. 2d 236, decided by the District Court for the Western District of Louisiana, Shreveport Division, in 1925.

The leading text authorities are also in agreement with the above decision. *Corpus juris secundum*, Volume 16, Section 96, page 333, states:

> "This is not an inflexible rule, and in some instances constitutional questions inherently involved

> in the determination of the cause may be considered even though they may not have been raised as required by orderly procedure. Also, it is not necessary to the attack of a statute that its unconstitutionality be pleaded, if it has already been held invalid in another case. It has been held that the failure of one suing to enforce certain rights to allege the unconstitutionality of a statute pleaded in bar of such suit does not preclude objection to its constitutionality when so pleaded since anticipation of the defense is unnecessary; * * *"

In fact, the plaintiff technically was prevented from pleading the unconstitutionality of the Innkeeper's Statute by the provisions set forth in the Federal Rules of Civil Procedure. As stated above, the complaint sets forth two causes of action based on (1) bailment and (2) fraud. The defendant raised the Innkeeper's Statute in its answer. According to Rule 7 (a)[8] of the Rules of Civil Procedure these were the only pleadings permitted. The only way that the plaintiff could have successfully set forth this issue in the pleadings would have been to apply to the court for a special order. We submit that this was unnecessary in this instance.

The Court of Appeals also stated that it could not hear this important issue because the plaintiff had not raised it in a statement of points. It is true that no such state-

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[8] "Rule 7. Pleadings Allowed: Form of Motions

(a) Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if leave is given under Rule 14 to summon a person who was not an original party; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer. As amended Dec. 27, 1946, effective March 19, 1948."

ment was prepared on behalf of plaintiff but it was precluded from doing so because the appeal was taken under the rules of the Seventh Circuit as promulgated on July 1, 1956 and such a statement was abolished by Rule 12 (h).

Assuming, without conceding, that the plaintiff had not properly raised the constitutional question in the lower court, the Court of Appeals for the Seventh Circuit should have decided the question, especially since it was raised by both the plaintiff and the defendant in their briefs. This appellate court has itself stated that it would look into the applicable law to avoid an erroneous decision where such law had not been insisted upon previously.[9]

In the courts below, the plaintiff strenuously argued that the defendant could seek no solace from the Innkeeper's Statute because it had committed a fraud. The plaintiff proved the five elements necessary to sustain this cause of action. In fact, the defendant practically admitted all the necessary facts. Admittedly the plaintiff's employee requested that his traveling bags be placed in a vault and the defendant's employees stated that this would be done. However, that statement was false and fraudulent. The defendant did not have a vault sufficiently large to contain the cases. This fact was known to the defendant and by relying thereon plaintiff suffered a substantial loss. Neither the District Court nor the Court of Appeals made a specific finding on this cause of action as required by Rule 52 of the Rules of Civil Procedure:

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[9] In *Huntress v. Huntress Estate*, 7 Cir., 1957, 235 F. 2d 205, 209, the court said:

> "Here the parties were given opportunity to present arguments on the point raised, and they have done so. We see no reason why we should make what we think would be an erroneous decision, because the applicable law was not insisted upon by one of the parties."

"Rule 52. Findings by the Court.

"(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b). As amended Dec. 27, 1946, effective March 19, 1948.

"(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment."

In fact, the Court of Appeals stated that such a finding was immaterial.[10]

Rule 52 definitely demands appropriate findings on the second paragraph of the complaint and the failure of the trial court to do so seriously prejudiced the plaintiff's rights. It is submitted that it is not the intent of the Innkeeper's Statute to protect an innkeeper who has perpetrated a fraud on its guest. The failure to make proper findings was urged in the lower court both immediately after trial and thereafter on a motion for a new trial. It was also stressed in the Court of Appeals, both in the original brief and the Petition for Rehearing.

The decision below departed so far from the accepted and usual course of judicial proceedings of a court as to call for a review of the decision when it refused to consider petitioner's case on the merits by an erroneous interpretation of its own rules and a hypertechnical construction of the Federal Rules. The matter was specifically called to the court's attention in the Petition for Rehearing wherein it is pointed out that "Fundamental constitutional rights should not be lost in courts of justice so easily under the Federal Rules." The decision is in direct conflict with

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[10] Appendix B

> "• • • The legal relations between plaintiff and defendant, prevailing at common law between innkeepers and guests, has been so drastically altered and differently defined by the Indiana legislature that both theories undergirding plantiff's complaint fail. See §37-107, *supra*. Consequently those allegations in plaintiff's 'second paragraph,' so-called, sounding in tort were immaterial and undeserving of precise findings of fact in the trial judge's ultimate disposition based squarely on the Indiana legislation. In our view Rule 52, *Federal Rules of Civil Procedure*, 28 U. S. C. has been adequately obeyed and plaintiff's asserted error on that phase of the case is without substance as are all its other points."

your holding in *Conley* v. *Gibson*, 355 U. S. ....., 78 S. Ct. 99, 2 L. ed. 2d 80 at 86, wherein this court said:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."

Conclusion.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Dated: February 10, 1958.

Respectfully submitted,

GEORGE B. WARBURTON,
Counsel for Petitioner,
96 Fulton Street,
New York, N. Y.

J. A. BRUGGEMAN,
PHIL M. MCNAGNY,
Utility Building,
Fort Wayne, Indiana,
Of Counsel.

Appendix A.

Opinion.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12041. SEPTEMBER TERM AND SESSION, 1957.

EICHBERG & COMPANY, INC.,
Plaintiff-Appellant,

v.

VAN ORMAN FORT WAYNE CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.

October 22, 1957.

Before FINNEGAN, SCHNACKENBERG and HASTINGS, *Circuit Judges.*

FINNEGAN, Circuit Judge. Missing jewelry valued at $29,646.50 is the reason for this lawsuit. Two bags, or cases, containing these jewels were carried into defendant's hotel by plaintiff's traveling salesman, Danziger, up to the desk where he registered on a card imprinted with this message: "Notice to Guests. A safe is provided for the deposit of money, jewelry and other valuables. This hotel will not be responsible for valuables not deposited." After registering, Danziger handed the two bags in question to defendant's bellboy, saying: "I want these two bags put in the vault." In response the bellboy gave Danziger two Safety Deposit Envelopes, on each of which was printed:

> "In accepting this envelope and contents for safekeeping, we assume no liability other than that

> provided for in the Inn Keepers' Act of this state (Indiana), which has limited our liability so that in no event can we be liable for more than the amount specified in said Act. The employee accepting this envelope has no authority to accept same if the contents are valued at more than the amount specified in said Act."

Danziger signed each envelope below that passage just quoted, omitting, however, to fill in the line for declaration of value. The two receipts were detached, given to Danziger, and the retained parts of the envelopes fastened, one around, each bag handle. They were placed in the manager's office since defendant's hotel safe was not large enough to hold the two bags Danziger parted with while persistently remaining silent as to the contents or value. When he presented his claim stubs the following morning defendant's employees were unable to return the jewelry or bags. Presumably they were stolen by unknown persons. It is undisputed that Danziger believed the hotel had a safe; that his employer, the plaintiff, was a wholesale jeweler and owner of the missing items.

Reversal of the judgment for defendant is asked on several grounds, chief among which are plaintiff's suggested unconstitutionality and inapplicability of the following Indiana statutory provisions[1] to the issues raised by the complaint:

> "37-105. Whenever the proprietor or manger of any hotel, apartment hotel, or inn, shall provide a safe in a convenient place, for the safekeeping of any money, jewels, ornaments, furs, bank notes, bonds, negotiable security, or other valuable papers, precious stones, railroad tickets, articles of silver or gold, or other valuable property of small compass, belonging to or brought in by the guests of such hotel, apartment hotel, or inn, and shall notify the guests thereof by posting a notice in a public and conspicuous

[1] 7 Burns, Indiana Stats Annot. title 37, chap. 1 (1949 Repl. Vol.), §§ 37-105 to 37-107.

place and manner at the place of registration of such hotel, or in each guest room, stating the fact that such safe place is provided in which such articles may be deposited, if such guest shall neglect or fail to deliver such property to the person in charge of such office for deposit in such safe, neither such hotel, apartment hotel, or inn, nor the proprietor nor manager thereof, shall be liable for any loss of or damage to any such property sustained by such guest, or other owner thereof, whether such loss or damage is occasioned by the neglect of such proprietor or manager or of his agents or otherwise. If such guests shall deliver such property to the person in charge of such office for deposit in such safe, such hotels, apartment hotels, or inns, or the manager or proprietor thereof, shall not be liable for the loss or damage of such property sustained by such guest or other owner thereof in any sum exceeding the sum of six hundred dollars ($600), whether such loss or damage is occasioned by the negligence of such proprietor or manager or by his agents or otherwise, notwithstanding said property may be of greater value, unless such proprietor or manager shall have entered into a special agreement in writing agreeing to assume such additional liability."

"37-106. Except as provided for in the foregoing section the hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to personal property, other than merchandise samples or merchandise for sale, brought into such hotel, apartment hotel, or inn by any guest thereof, exceeding two hundred dollars ($200) in value, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless such manager or proprietor shall have contracted in writing to as-

sume greater liability. This limitation of liability shall apply also with respect to the liability for the safekeeping of any luggage or other personal property left in any hotel, apartment hotel, or inn to be checked in any check-room operated by such hotel, apartment hotel, or inn, whether such luggage or other personal property is brought in by and belongs to a guest or to a person who is not a guest."

"37-107. A hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss or damage to any merchandise samples or merchandise for sale, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless the guest or other owner shall have given prior written notice of having brought such merchandise into the hotel and of the value thereof, the receipt of such notice shall have been acknowledged in writing by the proprietor, manager or other agent and in no event shall such liability exceed the sum of four hundred dollars ($400) unless the manager or proprietor of such hotel, apartment hotel, or inn shall have contracted in writing to assume a greater liability."

Faced with an obvious statutory bar, or at least a clear ceiling on dollar liability, plaintiff grounded its complaint on two theories: (1) a common law action against the bailee for hire for failure to deliver the bailed property on demand, and (2) a common law action of deceit arising out of defendant innkeeper's alleged misrepresentation that the bailed property would be put in its vault for safekeeping "when in truth and in fact," plaintiff pleaded, "there was no such vault and there was never any intention to place the property in a vault." The complaint did not challenge the constitutionality of the Indiana Act. Yet plaintiff tells us of some oral argument, undisclosed by the record, touching on constitutional aspects, which,

of course, fails as a method for bringing such question before us on appeal; if indeed constitutional questions can be raised solely by counsel's oral comments in the trial court. In its reply brief plaintiff's counsel, answering defendant's point II, states: "There is nothing in the record to show the position of the plaintiff below on the constitutionality of the statute. Actually we do not know how to include that in the record without printing the briefs filed below and transcribing the oral arguments." No statement of the points on which plaintiff intended to rely on in this appeal appears of record. See *Federal Rules of Civil Procedure*, Rule 75(d), 28 U. S. C. See also: *Employer's Liability Assurance Corporation* v. *Maryland Casualty Company*, 230 F. 2d 370 (7th Cir. 1956). Exclusion of the constitutional issue leaves the Indiana Act interposed between plaintiff's claim and any recovery of damages.

As the record unfolds, it is abundantly clear that plaintiff's salesman was carrying merchandise within the meaning of §37 107 in two cases each about 5" thick and 30" long, "made specially so it wouldn't look like any ordinary jewelry case . . . all . . . [the] cases . . . are made to look a little different." Indeed Danziger also testified: "We just don't want to be so obvious . . . To everybody on the street that we are in the jewelry business." To this should be added his complete nondisclosure of the contents or value to the defendant's staff. This is not a situation of theft by the hotel-keeper from a guest. We think §37-107 was intended to protect innkeepers from undisclosed excessive liability. Imposition of liability on this defendant could only be based upon a written agreement complying with §37-107. *Fisher* v. *Kelsey*, 121 U. S. 383 (1887); See also *Gardner* v. *Jonathan Club*, 217 F. 2d 961 (1950) involving virtually the same form "A and B" checks used by the parties in the case before us. Danziger's undisputed non-compliance with §37-107 cut off that statutory, and only, remedy. The legal relations between plaintiff and

defendant, prevailing at common law between innkeepers and guests, has been so drastically altered and differently defined by the Indiana legislature that both theories undergirding plaintiff's complaint fail. See §37-107, *supra*. Consequently those allegations in plaintiff's "second paragraph," so-called, sounding in tort were immaterial and undeserving of precise findings of fact in the trial judge's ultimate disposition based squarely on the Indiana legislation. In our view Rule 52, *Federal Rules of Civil Procedure*, 28 U. S. C. has been adequately obeyed and plaintiff's asserted error on that phase of the case is without substance as are all its other points.

Plaintiff's motion for a new trial was rightly denied and the judgment appealed is affirmed.

JUDGMENT AFFIRMED.

A True Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

Appendix B.

Chapter 145, Acts 1945, Indiana Legislature.

37-105. Liability to guests.—Whenever the proprietor or manager of any hotel, apartment hotel, or inn, shall provide a safe in a convenient place for the safekeeping of any money, jewels, ornaments, furs, bank notes, bonds, negotiable security, or other valuable papers, precious stones, railroad tickets, articles of silver or gold, or other valuable property of small compass, belonging to or brought in by the guests of such hotel, apartment hotel, or inn, and shall notify the guests thereof by posting a notice in a public and conspicuous place and manner at the place of registration of such hotel, or in each guest room, stating the fact that such safe place is provided in which such articles may be deposited, if such guest shall neglect or fail to deliver such property to the person in charge of such office for deposit in such safe, neither such hotel, apartment hotel, or inn, nor the proprietor nor manager thereof, shall be liable for any loss of or damage to any such property sustained by such guest, or other owner thereof, whether such loss or damage is occasioned by the neglect of such proprietor or manager or of his agents or otherwise. If such guests shall deliver such property to the person in charge of such office for deposit in such safe, such hotels, apartment hotels, or inns, or the manager or proprietor thereof, shall not be liable for the loss or damage of such property sustained by such guest or other owner thereof in any sum exceeding the sum of six hundred dollars [$600], whether such loss or damage is occasioned by the negligence of such proprietor or manager or by his agents or otherwise, notwithstanding said property may be of greater value, unless such proprietor or manager shall have entered into a special agreement in writing agreeing to assume such additional liability. [Acts 1945, ch. 145, §1, p. 337.]

37-106. Personal property other than merchandise—Checked—Property—Liability.—Except as provided for in

the foregoing section the hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to personal pr· ·erty, other than merchandise samples or merchandise for sale, brought into such hotel, apartment hotel, or inn by any guest thereof exceeding two hundred dollars [$200] in value, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless such manager or proprietor shall have contracted in writing to assume greater liability. This limitation of liability shall apply also with respect to the liability for the safe-keeping of any luggage or other personal property left in any hotel, apartment hotel, or inn to be checked in any check-room operated by such hotel, apartment hotel, or inn, whether such luggage or other personal property is brought in by and belongs to a guest or to a person who is not a g .est. [Acts 1945, ch. 145, §2, p. 337.]

37-107. Merchandise—Liability.—A hotel, apartment hotel, or inn, or the proprietor or manager thereof, shall not be liable for the loss of or damage to any merchandise samples or merchandise for sale, whether such loss or damage is occasioned by the negligence of such proprietor or manager or his agents or otherwise, unless the guest or other owner shall have given prior written notice of having brought such merchandise into the hotel and of the value thereof, the receipt of such notice shall have been acknowledged in writing by the proprietor, manager or other agent and in no event shall such liability exceed the sum of four hundred dollars [$400] unless the manager or proprietor of such hotel, apartment hotel, or inn shall have contracted in writing to assume a greater liability. [A ·ts 1945, ch. 145, §3, p. 337.]